



November 20, 2001

Mr. Craig H. Smith
Deputy General Counsel
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OR2001-5391

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155110.

The Texas Workers' Compensation Commission (the "commission") received a request for information regarding reports of alleged safety violations involving two named individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that Attachment F is confidential under section 402.092 of the Labor Code. Section 402.092 provides that information maintained in the investigative files of the commission is confidential and may not be disclosed except in four limited circumstances, none of which apply here. Labor Code § 402.092(a). "Investigative file" is defined as "any information compiled or maintained by the commission with respect to a commission investigation authorized by law." *Id.* § 402.092(d). Section 414.005 of the Labor Code provides that the commission's Compliance and Practices Division shall maintain an investigation unit for the purpose of conducting investigations relating to alleged violations of the Texas Workers' Compensation Act (the "Act") and commission administrative rules. *See* Labor Code § 414.005; *see also id.* §§ 414.001, .002.

You inform us that the information at issue concerns possible violations of the Labor Code and the Act, as well as commission rules implementing the Act. You state that the commission maintains investigation files pursuant to section 414.002 of the Labor Code, which authorizes the commission to maintain a division of compliance and practices and requires that division to conduct investigations relating to alleged violations of the Act and commission administrative rules. *See* Labor Code §§ 414.001, .002. You indicate that the information at issue is contained in such investigation files, and is confidential under section 402.092. You do not indicate that the commission has made any findings relevant to section 402.092, subsections (e) and (f) of the Labor Code,¹ that would affect the disclosure status of the investigation file at issue.

Based upon our review and your representations, we conclude that Attachment F consists of investigative material that is subject to section 402.092. Accordingly, the commission must withhold this information and may release it only in accordance with section 402.092(a). A release in response to the present request would not constitute a disclosure under one of the four permissible circumstances enumerated in section 402.092(a) of the Labor Code. Therefore, Attachment F is confidential pursuant to section 402.092 and must be withheld under section 552.101 of the Government Code. *See also* Gov't Code § 552.352

Next, we address your contention that portions of Attachments C, D, and E are confidential under section 402.083 of the Labor Code. Section 402.083 provides that "[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this subtitle." This office has interpreted section 402.083 to protect only that "information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers' compensation claims." *Open Records Decision No. 619 at 10 (1993)*. You contend that the injured employees'

¹These subsections provide:

(e) The commission, upon request, shall disclose the identity of a complainant under this section if the commission finds:

- (1) the complaint was groundless or made in bad faith; or
- (2) the complaint lacks any basis in fact or evidence; or
- (3) the complaint is frivolous; or
- (4) the complaint is done specifically for competitive or economic advantage.

(f) Upon completion of an investigation where the commission determines a complaint is groundless, frivolous, made in bad faith, or is not supported by evidence or is done specifically for competitive or economic advantage the commission shall notify the person who was the subject of the complaint of its finding and the identity of the complainant.

names, dates of injury, commission claim numbers, social security numbers, home telephone numbers, home addresses, dates of birth, and employers' names and addresses are confidential under section 402.083. Upon review of that information, we conclude that all of the information you seek to withhold either implicitly or explicitly discloses the identity of claimants, with the possible exception of the employers' names and addresses. Therefore, we agree that you must withhold the injured employees' names, dates of injury, commission claim numbers, social security numbers, home telephone numbers, home addresses, and dates of birth under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code.

With respect to the employers' identities and addresses, you contend that the information could implicitly identify the injured employees. However, you state that the commission did not have the capability, given the time constraints of requesting a decision and the level of the commission's manpower, to determine whether the name of the employers and the employers' addresses could implicitly reveal the identity of the injured employees at issue in this file. Nevertheless, you contend that the names of the employers and their locations should be withheld under section 402.083 of the Labor Code. The determination of whether information implicitly reveals the identity of an employee who filed a worker's compensation claim must be made on a case-by-case basis. Open Records Decision No. 619 at 10 (1993). This office has previously concluded that the legislature, in enacting section 402.083, did not intend to except from disclosure the identities of employers as a matter of law. *Id.* Rather, identities of employers are excepted from disclosure under section 402.083 only when a determination is made, based on the facts of the particular case, that the release of the employer's identity would implicitly disclose the identity of the injured employee. *See id.* This office has further indicated that the determination of whether the release of an employer's identity could implicitly disclose an injured employee's identity can depend on the size of the employer's workforce. *See id.* We believe another significant factor in this determination is the extent to which the employee's position with the employer is revealed by the information at issue.

You have provided our office with no specific factual demonstration that the revelation of the identities of the employers in this file would implicitly reveal the injured employees at issue. Indeed, you indicate that you had neither the resources nor the time to determine such facts. Under the Public Information Act (the "Act"), the commission is required to make a good faith effort to relate a request for information to information in its possession and, unless the information is determined to be excepted from disclosure, provide this information to the requestor within a reasonable amount of time. *See* Gov't Code § 552.221; Open Records Decision Nos. 664 at 4-5 (2000) (what constitutes a "reasonable amount of time" depends on the facts of the case), 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989); *cf. Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 686-87 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (the amount of time and money it will take for the a governmental body to respond to a request are not sufficient reasons for failing to

produce responsive information). Accordingly, in order to comply with the Act the commission must determine, within a reasonable amount of time, whether revealing the employers' information will implicitly disclose the identities of the injured employees. To the extent the employer information would implicitly reveal the identity of an injured employee, the commission must withhold the information under section 552.101 of the Government Code and section 402.083 of the Labor Code. Otherwise, the commission must release the employers' information.

Next, we address your contention that portions of the submitted information are confidential under the Medical Practice Act (the "MPA"). Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We agree that the some of the submitted information is subject to the MPA and, therefore, may be released only in accordance therewith. We have marked this information.

We also note that the submitted information contains chiropractor records. Section 201.402(b) of the Occupations Code states:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

Thus, section 201.402(b) makes confidential the submitted chiropractor records. Sections 201.403 and 201.404 of the Occupations Code provide exceptions to this confidentiality provision. Thus, the department must withhold the submitted chiropractor records, which we have marked, pursuant to section 201.402(b) unless otherwise authorized to release the information under section 201.403 or 201.404 of the Occupations Code.

With respect to those portions of Attachment C, D, and E that are not excepted from disclosure under section 552.101, we address your claims under sections 552.108 and 552.111 of the Government Code. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." However, section 552.108 applies only to records that can be characterized as the records of law enforcement agencies or prosecutors. Thus, section 552.108 applies to the records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce the criminal laws. See Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981). It generally does not apply to the records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). Therefore, we conclude that the remaining information in Attachments C, D, and E may not be withheld under section 552.108.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. Upon review of the information in Attachments C, D, and E, we conclude that none of this information is excepted from disclosure under section 552.111.

In summary, you must withhold Attachment F from disclosure under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code. With respect to the information in Attachments B, C, D, and E, you must withhold the injured employees' names, dates of injury, commission claim numbers, social security numbers, home telephone numbers, home addresses, and dates of birth under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code. Likewise, you must withhold the employers' names and addresses under section 552.101 of the Government Code and section 402.083 of the Labor Code to the extent you determine this information implicitly reveals the identities of the injured employees. You must withhold the marked medical records in Attachments C and D under the MPA unless you are otherwise authorized to release the records under that statute. You must also withhold the marked chiropractor records in Attachments C under section 201.402(b) of the Occupations Code unless you are otherwise authorized to release the information under section 201.403 or 201.404. You must release the remainder of Attachments B, C, D, and E.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 155110

Enc: Submitted documents

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